No. 21207

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,
Additional Cross-Appellee as to Count No. 4 only.

ON CROSS APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF OF HILLTOP REALTY, INC., et al., TO ANSWERING BRIEFS OF LARRY P. SMITH, et al., and THE AUSTIN COMPANY

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INTRODUCTION*

To serve the convenience of the Court and counsel, we make a joint reply to the Answering Briefs of Smith and Austin. Hence, we are not following the exact format of their briefs but will refer to them in context with the subject matter of this reply.

*As in previous briefs, we are referring to cross appellants as "Hilltop"; and to cross appellees Larry P. Smith, et al., as "Smith", and The Austin Company as "Austin"; and individuals are identified by name where necessary for precise identification.

The briefs on Cross Appeal are designated by initials, i.e., Hilltop's Opening Brief on Cross Appeal, HOB, and Smith's and Austin's Answering Briefs, SAB and AAB respectively. Smith's Appendix to its Opening Brief on Appeal is termed "Smith App."

We commence with the antitrust issues, Count 3 dealing Ohio intrastate, and Count 4, interstate. For simplicity, w clude standing to sue and target area issues of fact and law turn, we discuss "fact" of damage, statute of limitations an terstate commerce. Finally, we deal with the contract issue Count 2, involving economic evidence justifying compensatory ages, being substantially the same facts as alleged in Count for fraud.

ANTITRUST ISSUES
Counts 3 and 4
(Including "standing to sue" and "target area")

(SAB 60-73; AAB 1-37; SAB 1-3)

The factual and legal contentions of Smith and of Austi mind us of a famous expression, "the lethal blow of facts" c late learned John Bassett Moore, an outstanding authority in field of international law.

What are the "lethal" facts here? They are definite an comprehensive. They are simply stated in Hilltop's Content and all reasonable inferences (R. 651-91), and its incorpor references (R. 653, 555-89; see particularly R. 681-9 and 57 The trial court assumed all of these to be true (HOB App. B; R. 829). They are also largely documented in the Admitted a on the fraud and contract counts (R. 1054-1265).

First, Hilltop's Contentions clearly allege that the Mt property was a potential regional shopping center site in the eastern Cleveland suburbs (HOB 7, 52-3). As we have pointed

(HOB 31-58), it fulfilled all the criteria of Smith's standards for a regional shopping center despite Smith's claim of excessive competition (Ex. 29, cover letter; Smith App. 150-1).

Second, the various Smith defendants, and also Austin, in their efforts to "marry the competition" between the Higbee and Halle department stores (Exs. 249*, 251*; R. 567-9, 684-5), deliberately entered into an anticompetitive conspiracy which directly affected Hilltop and the Winslow sisters. For example:

1. Prior to and at their June 11, 1957, meeting in the Statler Hotel in Cleveland, representatives of Smith, Austin and Halle (Ex. 265, p. 88; R. 567-8) continued a conspiracy to "preclude construction of competitive facilities" and keep Severance "dominant" so as to avoid the "risk of a third development taking place" (Ex. 250*, p. 2; R. 568) in the relevant market of Severance in which Nutwood is situated (R. 683, 1188-9, 1191).

2. Prior to that meeting, Austin's representative frankly told Smith that Austin wanted to "control" the meeting and wanted to prevent development of other shopping centers (HOB 9-10). See letter from Beatty of Austin to Treiger dated June 5, 1957 (full text, Ex. 260*, pp. 25-24 from bottom; R. 1118); also see memorandum prepared by Smith representative of Proposed Agenda for June 11 (1957) meeting (full text, Ex. 260*, pp. 30-26 from bottom; R. 1119).

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*These exhibits were identified but not received in evidence at the trial of the fraud and contract counts. However, they are retained in the District Court Clerk's file and, under revised rule F.R.Civ.P. 75, were stipulated to be "a part of the record on appeal for all purposes" (R. 2200).

3. They urged that, if the two stores developed toget "there would be a smaller amount of specialty store competi than would arise if the [two] stores were to locate at inde dent sites" (Ex. 251*, pp. 3-4; R. 1098, lines 10-13).

4. In the light of the foregoing basic facts, the rep Smith to Hilltop (Ex. 29) is an admission against interest. on page 1 of Exhibit 29 (Smith App. 150), Smith (through it representative, Mr. Treiger) states that:

> "1) The population of the trading area [of Nutwood] i in itself, sufficient to generate substantial re- tail spending.
>
> "2) The site enjoys regional access. In fact, upon the completion of the contemplated highway improv ments, the site's accessibility throughout the trading area can be described as excellent.
>
> "3) Total retail spending by trade area residents is substantial. In view of the distance of the trad area from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facilities is very signifi cant.
>
> "4)**. . . ."

Why, then, did Smith accept employment from Hilltop o half of the Winslow sisters to make a study of the develop Nutwood as a regional shopping center? Why, then, after t favorable statements as to the qualifications of Nutwood a regional shopping center (Ex. 29) did they recommend again

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*See footnote, page 3, supra.
**Re alleged competition, referred to below, pp. 19, 22ff.

It is no defense for Smith or for Austin that Hilltop read in newspaper accounts that Higbee and Halle might or would locate at Severance (AAB 11; SAB 65-6). If in fact Smith and Austin concealed from Hilltop the fact of their deliberate and expressed secret conspiracy with Higbee and Halle to prevent the development of any other regional shopping center site in the eastern area of metropolitan Cleveland, then, under any theory, not only the owners of Nutwood or of the various Beachwood sites but also all other such potential shopping center sites were the targets of this conspiracy. It was intentional, willful and deliberate. Whether others sued or not is immaterial. Their anticompetitive purpose is a jury question.

As this Court stated in Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965):

> ". . . it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. Daily v. United States, 282 F.2d 818, 820 (9th Cir. 1960). A knowing wink can mean more than words. . . ."

There are many cases supporting this doctrine, but here we do not have to prove conspiracy by inference or by parallelism. All we have to do is examine the Contentions documented by correspondence and memoranda admitted or offered in evidence, which are specific conspiratorial agreements. It was, by the Contentions, agreed rather than inferred. Thus the issue of conspiracy is one of "fact" for a jury to decide. What more does one need

to prove in an antitrust action?

The antitrust cases cited by Smith and Austin are both i relevant and distinguishable. They ignore the target area th of Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2 190 (9th Cir. 1964), (HOB 20, 22), and of breach of a fiduci duty constituting also an antitrust violation, Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), (HOB 2) Furthermore, Goldwyn is supported by the latest case, Hoopes v Union Oil Co., (9th Cir. Cause No. 20,185, decided Feb. 3, 16 but not yet reported), _____ F.2d _____ (9th Cir. 1967).

The first case even remotely related to the issues unde this portion of our Reply Brief is Parmelee Trans. Co. v. Ke 292 F.2d 794 (7th Cir. 1961), (SAB 64). This case upheld a motion for dismissal because there was no genuine issue as t material fact. But there are genuine issues as to materia in this case.

Productive Inventions v. Trico Products Corp., 224 F.2 (2nd Cir. 1955), (SAB 68), is not in point here. First, itin volves a patentee and, secondly, it holds that only those a w a violation is directly aimed or who have been directly hare may recover. This Circuit has distinguished such cases.

Rayco Manufacturing Company v. Dunn, 234 F.Supp. 593 (N Ill. E.D. 1964), (SAB 71), is really a case in favor of Hi since, in effect, it holds that injury must result from le

*See Appendix attached hereto.

competition or monopoly and that, where there was no joinder to control the market or institute unlawful acts, there was no liability.

Savon Gas Stations No. 6, Inc. v. Shell Oil Company, 203 F.Supp. 529 (D. Md. 1962); aff'd 309 F.2d 306 (4th Cir. 1962), (AAB 27; SAB 64), is not relevant on the antitrust issues. It merely held that a restrictive covenant in a lease of a gasoline service station by owners of a shopping center, giving the lessee exclusive right to operate a service station in that particular shopping center, did not violate the Sherman Act since it was not a conspiracy. See Hoopes, supra, ¶III, p. 9. The facts are completely different from our case and therefore it should be disregarded.

Gaylord Shops, Inc. v. Pittsburgh Miracle Mile, etc., 219 F.Supp. 400 (S.D. Pa. 1963), (AAB 21; SAB 65), was not a conspiracy case under the Sherman Antitrust Act but a Robinson-Patman Act case. It involved discrimination against only one lessee in one shopping center and it held that interstate commerce was not involved. It also held that the Robinson-Patman Act applies only to commodities as distinguished from realty, whereas, in the Hoopes case, supra, the Sherman Act was held to apply to real estate.

The only other cases cited on the antitrust issues in either the Smith or Austin briefs which deserve, in our opinion, any mention are distinguishable as follows:

Page v. Work, 290 F.2d 323 (9th Cir. 1961), (SAB 64). case is clearly distinguishable since it involved only a sto holder's derivative action on behalf of a corporation engage publication of legal advertising which was completely intras in nature. There was no indication whatever of any intersta commerce by the publisher, the stockholder or any others inv in the case, which was entirely different from the factual s tion here. We might add that, in the case of Lone Star Ceme Corporation v. F.T.C., 339 F.2d 505 (9th Cir. 1964), the Pag case was referred to. It was neither approved, distinguishe overruled, but it is obvious from a full reading of the Lone case that the factual situation was quite different.

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 5 (9th Cir. 1952), (AAB 29; SAB 67, 68), is not relevant on ei the facts or the law. The pertinent language is as follows:

> ". . . Not one of the acts alleged to have caused injury to the appellants effectuated or tended to create a restraint on commercial competition in the motion picture industry. . . . A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more th that one purpose of the conspiracy was the restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. . . . Supra, 54-5.

Certainly under the text and under many of the references co tained in the pretrial order and the Contentions of Hilltop

which are assumed to be true, the conspiracy in this case was directed to all potential future shopping areas in eastern Greater Cleveland and Nutwood was within the target area of the economy involved.

Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2nd Cir. 1964), (AAB 22; SAB 68), involves "remoteness" of the flow of bowling alley equipment in interstate commerce just as the Hoopes case, supra, involved the flow of gasoline in interstate commerce to Alaska. This, and other cases cited (SAB 68), are inconsistent with the Hoopes case, cited supra. Furthermore, the court in this case said at page 272:

> "There is nothing to indicate the amount of commerce affected or that the alleged restraint affects any bowling alley equipment other than the equipment that would have gone into the building to be leased by Lieberthal."

What a difference from the conspiracy claimed by Hilltop and assumed to be true (HOB App. B3; R. 829) and that of two interstate firms who entered into a conspiracy with two large department stores to prevent any further competition which, under the facts of this case, would definitely affect interstate commerce, the amount of which Hilltop is prepared to prove if given an opportunity to present its case to a jury. Compare the case of Safeway Stores, Incorporated v. F.T.C., 366 F.2d 795 (9th Cir. 1966), where the court stated at page 801:

> "Once the existence of the common scheme is established, very little is required to show that defendant became a party -- 'slight evidence may be

sufficient to connect a defendant to it.' (citing cases)

The other antitrust cases cited by Smith and Austin are irrelevant, both from a standpoint of fact and of law, that w do not think it necessary to take the time of this Court to d with them. We merely refer to Hilltop's Opening Brief (HOB 1 27), and again, particularly to the Goldwyn case, supra, wher this Circuit concluded that the plaintiff did not need to sho that the conspirators knew that their conspiracy would affect plaintiff (Hilltop and the Winslow sisters, in this case) as as they were within the target area. Again, we repeat that i was cited with approval in the Hoopes case, supra, both on th general question of conspiracy and the question of the target area, and the Hoopes case involved facts far less favorable t Hoopes than the facts in this case are to Hilltop and the Win sisters.

Finally, on the question of "standing to sue", see the l paragraph of Earl E. Pollock's article, 32 Antitrust Law Jour page 7.

Hilltop's Contentions Established "Fact" Of Damage*(SAB 1-3).

The "fact" of damage cases are clearly distinguished fro the instant case where, on motions for partial summary judgme and dismissal, the trial court accepted as true that Smith's allegedly false market analysis (Ex. 29) was made to suppres potential competition to Severance and that Austin conspired i this same objective (HOB App. B3-4; R. 829-30).

Nor is the "fact" of damage issue properly before this o on motions for summary judgment or dismissal because, in grat

*See Rowley, 32 Antitrust Law Journal, pp. 75-86 (1966).

these motions, the trial court assumed the truth of the Contentions of Hilltop that Nutwood would probably have sold for $20,000 an acre had it not been for the conspiracy of Smith and Austin (R. 675, 829). The alleged "unlawful acts alone are proof of damage", Lessig v. Tidewater Oil Company, 327 F.2d 459, 471, note 31 (9th Cir. 1964), and other cases cited. The "fact" of damage has, with approval, been raised by a special verdict, Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 379 (9th Cir. 1966).

In Gaasland Co. v. Hyak Lbr. etc., 42 Wn.2d 705, 714, 257 P.2d 734 (1953), there was a "fact" of damage issue under a contract claim (SAB 2). The court cited 1 Restatement of Contracts, §331, comment a, of a jury finding damages where ". . . experience of mankind is convincing that a substantial pecuniary loss has occurred, while . . . the amount in money is incapable of proof. . . ." Here, likewise, there is no basis for reconstructing the past to show with precision the amount of damage. It will be for a jury to make its best estimate, not on speculation but on "experience of mankind".

Clearly Hilltop and the Winslow sisters were entitled to a jury determination of damages where the trial court assumed the "fact" to be true that, if Hilltop had been truthfully and loyally advised by Smith as to the suitability of Nutwood as a regional shopping center and related business development, a minimum of $20,000 an acre would have been warranted (R. 675).

It assumed also as true that comparable sales of property in Greater Cleveland area for use as shopping centers ranged frc $10,000 to $50,000 an acre (R. 675). A jury should be permit to determine the reasonable probability that Nutwood would ha been sold within that range but for the wrongful anticompetit acts of Smith and Austin.

The "fact" of damage is generally merged with the amount damage, 22 Am.Jur.2d, Damages, §§23, 24; McCormick, Damages, (1935). Thus, contrary to Smith's claim (SAB 1-3), if this is remanded, Hilltop will have its opportunity to prove to a jury the "fact" and "amount" of antitrust damages. The stana of proof will not be, as in the fraud count, that of "clear, cogent and convincing" evidence, but only of a "preponderanc" where the wrongdoers have made more precise evidence unavailb (HOB 60-1). If, then, the jury brings in a verdict for Hill the court may, of course, review it to determine that there s sufficient predicate of "fact" of damage. But even if it sho hold that there was not, there would then be in the record suf cient opportunity for appellate review of such a determinat n If, on the contrary, the court should believe there was sufic evidence to justify a verdict, the fact that the court migh h concluded differently is without significance (see HOB 21); a see Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 294-6, 261 P.2d 73 (1953), opinion of then Judge Hamley; and Walla Wa Port District v. Palmberg, 280 F.2d 237, 249 (9th Cir. 196

A case almost completely parallel on "fact" of damage is Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653, 660-1, 663 (9th Cir. 1965). It was another antitrust case before Judge Beeks. Preliminary motions to take it from the jury were denied. The jury rendered a verdict for plaintiff (D.C. WD Wash. ND 1964, No. 5346, Wescoast v. Jerrold). The District Court file shows that thereafter defendants filed motions for judgment notwithstanding the verdict and for a new trial alleging a complete lack of proof of "fact" of damage and that the evidence was totally insufficient to show any liability. These motions came on for hearing March 2, 1964 (No. 5346, Papers 55, 56, Tr. Vol. 20). Counsel for plaintiff contended:

> "Your Honor will recall that when I asked for time to argue for a motion for directed verdict your Honor granted it to me and said, whether or not you agreed with me, you would leave it to the jury because this could be considered later . . . and I shall try . . . to show . . . why . . . we are entitled to judgment." (Emphasis added.) (No. 5346, Tr. Vol. 20, p. 2109)

The court, after argument, denied the motions stating:

> "I am very frank to say, gentlemen, that if the matter had been tried to me that I have considerable doubt as to whether I would have found any damages in this case. I doubt that I would have; but I do think that there was sufficient evidence that the jury was entitled to find what they did and I cannot substitute my judgment for theirs." (Emphasis added.) (No. 5346, Tr. Vol. 20, pp. 2133-4)

Thus, the "fact" of damage and the "amount" of damage were merged in the jury verdict. This Court affirmed Jerrold Electronics, supra, 341 F.2d at 666. The "fact" of damage should be similarly merged on jury trial here.

Evil Intent Not A Requisite Of Civil Conspiracy.

Jerrold, supra, like Austin (AAB 17-8), also claimed that proof of conspiracy requires evidence of evil design. This C rejected such a contention, quoting with approval Continental Co. v. Union Carbide Corp., 370 U.S. 690, 707, 8 L.ed.2d 777, 82 S.Ct. 1404, 1415, that:

> "'[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.'" Jerrold, supra, at 663.

Jury Trial A Normal Procedure In Antitrust Cases.

Finally, the issue here is summary judgment in a complex antitrust case where the Supreme Court has cautioned against denial of jury trial where the facts are sharply in dispute (HOB 3, 25).

Hilltop respectfully submits the antitrust claims should remanded for jury trial of its complex issues.

Statute Of Limitations.

As to Count 3, involving violations of the Ohio antitru law, there is no statute of limitations. The second paragra §1331.12 of the Ohio Revised Code reads:

> "No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation of Section 1331.01 to 1331.14, inclusive of the Ohio Revised Code."

(The above refers to the sections of the Ohio Revised Code r ing to "Monopolies".) This answers any arguments as to the

applicability of any statute of limitation to Count 3.

We assume it is conceded that the statute of limitations under the Federal laws is four years. Therefore, under the facts of this case, the statute of limitations had not run when the First Amended Complaint of Hilltop was filed because Smith and Austin were still commiting conspiratorial overt acts in the construction of a shopping center, including the Higbee and Halle stores, which, in their own language, would "dominate" the eastern area of metropolitan Cleveland and preclude any further competition (see Hoopes case, supra, ¶II, pp. 8-9). Austin contended the claim against it is barred by the statute of limitations (AAB 31-3). Hilltop did not know anything about a conspiracy by Smith and Austin to preclude the development of other shopping centers in eastern Cleveland until discovery proceedings began in 1963-4 (Tr. 2514-6). The fraudulent concealment doctrine therefore tolled the statute of limitations until Hilltop knew of the conspiracy directed against it. This was well settled in the electric industry cases (see in particular Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1962); cert. den. Nov. 19, 1962, 83 S.Ct. 256. The first notice Hilltop had of any relationship other than as a consultant of Smith to Austin was on July 21-22, 1960, when Cleveland newspapers indicated that Austin had sold Severance to Smith (R. 1244). After repeated inquiries (R. 1245-51) concerning the nature of the Smith-Austin relationship and the validity of the original report

(Ex. 29), Smith tendered to Hilltop a "substantiating" report (Ex. 10) in February 1961. This had the effect of lulling Hilltop into the belief that the report was valid. Even if th statute of limitations did not commence until 1963 or 1964 du ing discovery proceedings (when Hilltop first learned of the c spiracy directed against it), the statute of limitations in a event had not run because Smith's "substantiating" report in February 1961 had the effect of lulling Hilltop into the beli that the report was valid.

Thus, under the fraudulent concealment doctrine referred supra, the only question is whether Hilltop exercised reasona diligence in filing its First Amended Complaint which was "lo July 20, 1964, and "filed" July 24, 1964. Certainly, in view Hilltop's repeated inquiries concerning the nature of the Smi Austin relationship and Smith's "substantiating" report, Hill acted with reasonable diligence.

But even if these two arguments are invalid, the fact th the action was filed four years and three days after Hilltop the July 21, 22, 1960, newspaper stories does not mean the statute of limitations had run, as the "lodging" of Hilltop's First Amended Complaint, which was accomplished within the 4 period, was sufficient to toll the statute. See Robinson v. Waterman S.S. Co., 7 F.R.D. 51, 53 (DC D. N.J. 1947); Thorndi Smith, Wild, Beebe & Cades, 339 F.2d 676, 679 (8th Cir. 1965.

Interstate Commerce.

So far as Count 3 is concerned, involving Ohio law, the oint of interstate commerce is immaterial and we, therefore, ereby dispose of it.

As to Count 4, it was admitted that many of the purchases at everance Shopping Center were from out-of-state customers and ome of the sales were to out-of-state purchasers (R. 682). urthermore, it has been admitted that Smith and Austin were arge interstate commerce corporations, perhaps the greatest in heir particular fields (R. 681). In the recent Hoopes case, upra, this Circuit sustained the jurisdiction of the trial ourt even though none of the sales of Hoopes' lessee were in nterstate commerce, and certainly Hoopes was no more engaged in nterstate commerce than Hilltop or the Winslow sisters were, ince he was merely the owner and lessor of a service station and ot engaged in the business of selling gasoline. It is obvious, herefore, from a consideration of the facts in the Hoopes case nd the decision of the Court, that interstate commerce would not ave been involved had it not been for the fact that Union Oil ompany was itself engaged in interstate commerce, just as Smith nd Austin were here. It is therefore obvious that the cases ited by Austin and Smith (AAB 21-9; SAB 64-5) on this issue are ot relevant.

COMPENSATORY DAMAGES
Counts 1 and 2

(SAB 3-60)

Count 1, fraud, and Count 2, breach of contract, involve substantially the same facts. Count 1 is not discussed in this Reply Brief because judgment was granted in Hilltop's favor as to punitive damages and attorney's fees. The remaining claims for compensatory damages under Count 1 are the same as those di cussed below for compensatory damages under Count 2.

The Conclusions Of The Nutwood Analysis (Ex. 29) Were Clearly False And Fraudulent (SAB 3-22).

On January 8, 1960, Hilltop received a copy of the Nutwoo analysis (Ex. 29) from Smith. It received nothing more until after the Winslow sisters had sold Nutwood in June 1960, excep for copy of an inaccurate memo dated August 9, 1960, justifyin Smith's conflict of interest (R. 1246-7), until February 1961 when it received a copy of the so-called "substantiating" repo (Ex. 10) at the offices of Smith's Cleveland counsel (Tr. 2644 R. 1249). It saw no work papers or other supporting data unti after the beginning of discovery in this lawsuit (Tr. 2514-6).

The false and fraudulent nature of the Nutwood analysis c be found by comparing the story Exhibit 29 tells with Smith's later attempt to defend and justify its conclusions.

The cover letter of the Nutwood analysis (Ex. 29; Smith Ap 150-2) dated January 7, 1960, comments on the four basic eleme of any shopping center analysis as follows:

"1) The population of the trading area is, in itself, sufficient to generate substantial retail spending.

"2) The site enjoys regional access. In fact, upon the completion of the contemplated highway improvements, the site's accessability throughout the trading area can be described as excellent.

"3) Total retail spending by trade area residents is substantial. In view of the distance of the trade area from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facilities is very significant.

"4) Competition, particularly in the department-store-type-merchandise categories is very substantial. Over a million square feet of department store space exists or is planned in the eastern suburbs of the Cleveland metropolitan area.

The preceding factor is particularly responsible for the conclusions of our analysis with respect to Nutwood Farms."

We will now deal with each of these four basic elements:

1. Population:

The cover letter to Exhibit 29 (Smith App. 150) states:

"The population of the trade area is, in itself, sufficient to generate substantial retail spending."

This statement should be compared with Smith's Answering Brief (SAB 37) which says:

". . . [Nutwood] had too few people . . . [and] about one-half of the area from which Nutwood would be normally expected to draw its patronage was deep in Lake Erie . . ."

The statement in Exhibit 29 should also be compared with Smith's appraiser's assertion that Nutwood was in "a pioneering area",

the density of the population of which "would not support a re gional shopping center" (Tr. 2006-7); and with John Marshall's assertion that one of the factors in causing the conclusions o the analysis to be negative was the "very sparseness of popula tion on the outboard side" (Tr. 1677).

These comparisons illustrate the tardiness of Smith's "di covery" that the Nutwood trade area lacked sufficient populati for a regional shopping center because half of it is now allegedly "deep in Lake Erie".

The approximate population of the Nutwood trade area was almost as easy for Hilltop to determine in 1960 as it was for Smith. So Smith reported that the population was sufficient t support a regional shopping center and blamed the absence of potential for Nutwood on its own esoteric concept of "effecti competition", a factor which it knew Hilltop to be incapable f challenging. Now that that concept is challenged, Smith ques tions the adequacy of the population of the Nutwood trade are, thus attacking the integrity of its own findings.

2. Access:

The cover letter to Exhibit 29 (Smith App. 150) further states:

> "The site enjoys regional access. In fact, upon the completion of the contemplated highway improvements, the site's accessability throughout the trading area can be described as excellent."

Compare this with the statement of Smith's Answering Brief (SAB 37-8) that:

> "Another problem with Nutwood was that accessability from the freeway spur was dependent upon whether the Bureau of Roads would approve a four-way interchange near the property. This approval was still conjectural when the sisters sold to Ridge Hills."

Compare the unqualified statement in the analysis with the implication (SAB 21) that Richmond Mall and Great Lakes Mall, both of which lie within the Nutwood trade area, but each of which is farther from the freeway, are somehow more favorably located. And compare the analysis with Larry Smith's recent "discovery" that freeway access to a regional shopping center is relatively unimportant (Tr. 2352-3).

Hilltop, of course, knew as much about existing and potential access to the Nutwood site in January 1960 as Smith did. So Smith, in the Nutwood analysis, described access to Nutwood in glowing terms and blamed its lack of potential on excessive competition, as determined through the use of its private and unfathomable concept of "effective competition". Now, with that concept under challenge, Smith questions access to Nutwood as to the time of its analysis.

3. Retail Spending:

Smith, in its Nutwood analysis (Ex. 29, cover letter; Smith App. 150), described spending in the Nutwood trade area as follows:

> "Total retail spending by trade area residents is substantial. In view of the distance of the trade area

> from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facities is very significant."

Compare this with Smith's implication in its Answering Brief t the Nutwood site was similar to one in the Mojave Desert and t about one-half of its trade area is deep in Lake Erie (SAB 37) and that the potential which Smith found in 1960 and tapped nc on both sides of Nutwood, by new large regional centers at Richmond Mall and Great Lakes Mall (SAB 21), could be caused t disappear by a theory called "effective competition" which app ently affected only the site at Nutwood.

4. Competition:

Smith's 1960 analysis of Nutwood (Ex. 29, cover letter; Smith App. 150-1) cites no negative factors except for compet tion, described like this:

> "Competition, particularly in the department-store-type-merchandise categories is very substantial. Over a million square feet of department store space exists or is planned in the eastern suburbs of the Cleveland metropolitan area."

The minimum size of a department store for a regional shoppin center is agreed to be 150,000 square feet (Tr. 1918; Ex. 29, App.; SAB 22). A comparison of the table of existing and announced department stores in eastern Metropolitan Cleveland (Ex. 29, between pp. 5 & 6) with the map of the Nutwood trade area (Ex. 29, just before p. 1) leads to certain inevitable co clusions as to competition:

(1) Not one square foot of the more than 1,000,000 square feet of full-line department store space existing or planned in the eastern suburbs of Cleveland in 1960 was located or planned for the Nutwood trade area as delineated by Smith;

(2) The only significant department stores which even affected the Nutwood trade area were at least eight miles distant, inboard from the Nutwood site and outside of the Nutwood trade area; and

(3) The closest competing site with a full-line department store was that of the proposed Severance development, Smith's own site, the negotiations for the purchase of which were at a crucial stage during the preparation of the Nutwood analysis.

In spite of the total absence of full-line department stores in or near the Nutwood trade area, Smith found such overwhelming "effective competition" affecting the Nutwood trade area as to make the site useless for regional shopping center purposes. Smith's Answering Brief deals with this concept from pages 6 through 22. Smith's argument is summarized (SAB 11) in the statement:

> "[Hilltop's] error is simply that it confuses retail sales <u>potential</u> and retail sales <u>capacity</u>. Potential is the amount of dollar spending that will be available within a given area. Capacity, on the other hand, is a measure of the capability of existing retail facilities at normal levels to absorb what potential may exist . . ."

For this distinction, Smith, in its Answering Brief, cites almost every Smith witness who testified at the trial and we

readily admit that almost every Smith witness made the distinc tion at some point in his pretrial or trial testimony.

The only sources of the definition of "sales capacity" an "effective competition" omitted from Smith's Answering Brief a Smith's 1960 Analysis of Nutwood Farms (Ex. 29) and its contem porary analysis of Severance (Ex. 142), and they tell an exact opposite story.

Those printed definitions cannot be reconciled with the d tinction which is the basis for Smith's Answering Brief, the gist of which is quoted above.

In Exhibit 29, "Total Sales Capacity" is defined as:

> ". . . the estimated . . . sales volume that existing retail facilities are capable of . . . holding under normal competitive conditions . . . In no way does the . . . term connote maximum physical capacity of a given plant to attain a given volume. It is, rather, an estimate of the amount of business that would be expected to be retained by existing stores in the face of competition from new facilities . . ."

and "Effective Competition" is defined in the Nutwood Farms Analysis (Ex. 29) as simply that portion of the "total sales a acity" of any store or stores derive from within the trade a under study.

And Exhibit 143, page 18, a study of Severance, defined "Effective Competition" as:

> ". . . the volume which . . . competitive facilities would probably continue to obtain from within the Severance Center trade area, even after the development of Severance Center . . ."

If sales capacity was, as Smith claims (SAB 11):

> ". . . a measure of the capability of existing retail facilities . . . to absorb what potential may exist"

Smith's position on this appeal would be difficult to assail. But that is exactly what it is not, according to the definitions in the Nutwood and Severance analyses. Capacity is "an estimate of the amount of business . . . to be retained by existing stores in the face of competition from new facilities", not a measure of capability to absorb either present or future potential. Thus, "effective competition" which is only a percentage of "total sales capacity", obviously can never exceed the potential of a given area but will always be at least a little less than the potential unless it is assumed that new facilities will do no business at all. Smith's use of the terms "total sales capacity" and "effective competition" in its Answering Brief is in error. This is the crucial point in this appeal. As a result, Smith's determination of "effective competition" in the Nutwood analysis was not only erroneous but impossible by the terms of its own definitions.

The Undelivered Introduction To Exhibit 29 (Ex. 175, bottom 3 pages).

The Nutwood analysis (Ex. 29) was fraudulent, not only because of the misinformation which it contained, but because of the valuable information which it omitted. Smith argues (SAB 3-5) that the introductory letter (Ex. 29; Smith App. 150-2) was a

substitute for the undelivered Introduction (Ex. 175, bottom 3 pages). This it may well have been, but it clearly omitted much of the information contained in the undelivered Introduction. That Introduction (Ex. 175, bottom 3 pages) not only postulated Montgomery Ward as a potential tenant, one which might well have been impressed with a recommendation from Smith, but also explained the reason for the extremely low percentage figures used in the Nutwood analysis (Ex. 29, pp. 6-7) in connection with the "Share of the Market Approach". Without the information contained in the undelivered Introduction, those percentages were totally unexplained, although they were the key to the negative conclusions postulated by Smith as stemming from the "Share of the Market Approach" (Ex. 29, pp. 6-7; Tr. 1567, 1676, 2199).

In summary, Smith was correct in stating that "the potential for suburban facilities is very significant" in the Nutwood trade area but it vastly overstated the effect of competition as shown conclusively by what has happened in the Nutwood area since the Smith analysis. What has happened has indicated the accuracy of the third finding of Smith's cover letter to the Nutwood analysis:

> "Total retail spending by trade area residents is substantial. . . . very substantial portions of total spending will be retained by local facilities . . . . Thus, the potential for suburban facilities is very significant."

The substantial retail spending by trade area residents is being retained, not so much by the competition which Smith concluded was so substantial as to preclude the development of

Nutwood as a regional shopping center, but by local facilities, including two major full-line department stores, one at Richmond Mall and one at Great Lakes Mall, together with at least six junior department stores or discount department stores built or planned since 1960 (R. 1456). The full-line department stores include a total of 475,000 square feet, and the junior and the discount stores at least 450,000 square feet (R. 1456).

Smith's findings 1), 2) and 3), in the cover letter to the Nutwood analysis (Ex. 29) were absolutely correct, but Smith's conclusions, the negative nature of which was based solely on Smith's contrived concept of "effective competition" were totally incorrect.

It is admitted that Smith failed to disclose to Hilltop the conflict of interest arising out of its almost completed negotiations to purchase Severance (R. 658ff). The conclusions of its analysis were clearly erroneous due solely to the misuse of its own methodology in determining competition.

Hilltop Proved That The Value Of Nutwood Substantially Exceeded $3,500 Per Acre.

Smith argues that Hilltop failed to prove that Nutwood was worth more than $3,500 per acre, principally because Hilltop's appraiser based his appraisal on developments subsequent to January 8, 1960 (SAB 43-60).

No appraiser viewing land in 1965 could see it precisely as it existed five years earlier. Mr. Fenton was no exception. But

the cause of Mr. Fenton's 1965 appraisal was Smith's 1960 fr
in failing to disclose its interest in Severance, and that f
distinguishes this case from any case dealing with condemnat
the type of precedent which is almost the exclusive basis fo
Smith's argument.

Even if Mr. Fenton's testimony is interpreted in the li
most favorable to Smith's case, Mr. Fenton assumed only thos
access conditions assumed by Smith in the preparation of Exh
29, used 1960 census material totally consistent with 1960 p
lation estimates used by Smith (Ex. 10, p. 5, where Smith st
the accuracy of its estimates as demonstrated by the 1960 ce
figures), and determined from his own investigation that zon
was not a problem. Smith raised no question of zoning in 19
and subsequent events proved both Smith and Fenton correct.

The only significant information available to Mr. Fento
1965, which would not have been available to him in 1960 an
was not assumed by Smith in the preparation of Smith's Nutwo
analysis, consisted of certain sales of regional shopping ce
sites between 1960 and the date of the trial. The use of sc
sales in establishing value is proper, United States v. 63.4
Acres of Land, 245 F.2d 140, 144 (2nd Cir. 1957); 32 C.J.S.
Evidence, §593(3), note 93.10, p. 736-7.

The trial court fell into the error urged by Smith and e
dently treated Mr. Fenton's testimony as if it were presen
a condemnation action in which the search for valuation of

land to be condemned is directed at, or near, the date of trial (Tr. 2771; R. 1470). This was error. The error was particularly significant as the trial court found that no expert opinion presented by Smith was directed at the value of Nutwood as a regional shopping center as of the date of Smith's fraudulent analysis (Tr. 2771; R. 1470). Thus, Mr. Fenton's testimony as to the value of Nutwood as a regional shopping center in 1960 was the only valid evidence before the trial court of that value. Furthermore, Mr. Fenton's estimate of the value of Nutwood as a regional shopping center site is substantiated by no less an authority than Larry Smith himself; see Smith's statements in Shopping Towns USA (1959) concerning the cost per acre of shopping center sites even "without a commitment in advance from a major tenant" (Ex. 368, p. 40) and with only "a reasonable likelihood that rezoning can be achieved" (Ex. 368, p. 38).

CONCLUSION

We respectfully submit that Hilltop and the Winslow sisters were entitled to a jury trial of the antitrust counts 3 and 4 because there were genuine issues of material facts, Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L.ed.2d 458, 82 S.Ct. 486 (1962).

Further, on count 2 (which embraces substantially the same compensatory damage issues as count 1), the trial court clearly erred in failing to find a fair measure thereof. This count should be remanded to the trial court for further determination

in a manner consistent with this Court's Opinion after oral ment and submission because we believe it will reach the "de ite and firm conviction that a mistake has been committed", United States v. United States Gypsum Co., 333 U.S. 364, 68 525, 92 L.ed. 746, 748 (1948), (Hilltop's Ans. Br. on Appeal 72).

DATED at Seattle, Washington, April 5th, 1967.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Herbert S. Little

Herbert S. Little
of
Attorneys for Cross-Appellants,
HILLTOP REALTY, INC., et al.

PROOF OF SERVICE

I CERTIFY that, pursuant to Rule 18(2)(d), on April 5th 1967, I caused five copies each of the foregoing document to be served on Helsell, Paul, Fetterman, Todd & Hokanson, attention of Richard S. White, Esq., and Gerald G. Day, Esq., 1610 Washington Building, Seattle, Washington 98101, counsel for Larry P. Smith, et al., and on Bogle, Gates, Dobrin, Wakefield & Long, attention of Robert W. Graham, Esq., and Ronald E. McKinstry, Esq., 14th Floor Norton Building, Seattle, Washington 98104, counsel for The Austin Company, by having my secretary hand deliver the same to them at said addresses and that said attorneys are all of counsel of record for cross-appellees.

/s/ Herbert S. Little

Herbert S. Little

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT HOOPES and RAE S. HOOPES,
Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,
Appellee.

No. 20,185

[February 3, 1967]

Appeal from the United States District Court
for the District of Alaska
at Fairbanks

Before: BARNES, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

The appellants, Mr. and Mrs. Hoopes, brought this action under section 4 of the Clayton Act, 15 U.S.C. § 15, against the Union Oil Company of California to recover treble damages for injuries allegedly resulting from violation of the antitrust laws, "including but not limited to" sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13. Two additional causes of action were alleged but are not at issue here.

After answer, partial discovery, and other pretrial proceedings, both sides moved for summary judgment on the antitrust claim. The district court granted Union's motion on the ground that appellants "lacked standing to sue . . . for the reason that under the facts of this case they are not persons injured in their business or property by reason of anything forbidden in the anti-trust laws

within the meaning of 15 U.S.C.A. § 15."[1] The district court determined there was no just reason for delay and directed entry of judgment. Rule 54(b), Fed. R. Civ. P. This appeal followed. We reverse.

The business history which climaxed in this suit may be briefly summarized as follows.

In 1945 appellants built a garage and service station on two lots which they owned in Fairbanks, Alaska. For a period of ten years, until late in 1955, the premises were operated as a Union station under "lease and leaseback" agreements between appellants and Union.

In the fall of 1955 Victor D. Hart expressed an interest in purchasing the service station from appellants. Negotiations involving appellants, Union, and Hart resulted in the execution on December 21, 1955, of the following related agreements.

Appellants and Union executed an instrument cancelling their "lease-leaseback" agreement on the property, which then had five and a half years to run.

Appellants contracted to sell the property to Hart. Hart paid appellants a down payment, borrowed from a bank, and executed "mortgages" on the real and personal property to secure the loan. Union arranged with the bank for the loan to Hart, and it agreed to satisfy the "mortgage" by payments to the bank of one cent on each gallon of Union gasoline sold by Hart at the station.[2]

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[1]Section 4 of the Clayton Act, 15 U.S.C. § 15, reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[2]Appellants allege that this one-cent payment constituted a discount or "kickback" to Hart and was not given in equal amount to other service station operators, and that this and other Union practices reflected price discrimination violating 15 U.S.C. § 13(a). As we read the allegations, these practices are attacked as among the means al-

Hart "leased" the property to Union for a term of fourteen years, ending December 31, 1970, Union agreeing to pay Hart "rent" of 1½ cents on each gallon of its own gasoline sold at the station. Hart "assigned" these rental payments to the bank to be applied to the down payment loan. Union "leased" the property back to Hart for the same fourteen-year term, Hart agreeing to pay Union "rent" of 1½ cents per gallon on all gasoline sold at the station, regardless of brand. Hart's "lease" to Union was terminable only at Union's option and on the occurrence of specified events affecting the usefulness of the premises as a service station. Union's "leaseback" to Hart was terminable by either party without cause on seven days' notice.

Appellants executed a "consent clause," attached to the Hart-Union "lease," by which appellants agreed that if they acquired possession of the premises before the "lease" expired, Union would be entitled to possession for the remainder of the fourteen-year lease.

Hart took possession of the property under this series of agreements, and operated it until August 9, 1956. On that date Hart "subleased" the station to two other individuals, Mr. Schroeder and Mr. Wisel. On April 1, 1957, Hart "subleased" the station to a corporation, Transfare, Inc., which he formed with the same two individuals. Both of these "subleases" were made with the consent of Union, and appellants allege that Union required the "sublessees" to agree to the same arrangements as existed between Union and Hart.

The business did not prosper, and on May 19, 1958, Hart and Transfare, Inc., quitclaimed their interests back to appellants. Appellants then leased the premises to Transfare, Inc., at an agreed monthly rental for a five-year term. "Rental" payments to Union under the Union "leaseback" to Hart were discontinued.

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legedly employed by Union to effectuate its program of exclusive dealing, and we do not consider the problems which would be raised if they stood alone. See note 6.

Since appellants' price discrimination allegations appear relevant on the theory suggested, we think the district court erred in barring discovery as to this issue.

At this juncture Union gave notice of Hart's default under the "leaseback" and demanded that appellants (and Transfare, Inc., appellants' lessee) relinquish possession of the premises under the "consent clause" to the Hart-Union "lease." Upon appellants' refusal, Union filed suit in the Alaska state courts seeking, among other things, to enforce its alleged right to possession, and to require appellants to pay off the balance due on Hart's obligation to the bank secured by the "mortgages" on the premises.[3]

On April 30, 1961, while the state court action was pending, Transfare, Inc., surrendered the premises to appellants. Appellants allege that they then tried to sell or lease the station but their efforts were frustrated by Union, which informed prospective purchasers and lessees that it held a valid fourteen-year lease on the station and threatened appellants with suit for an injunction if they persisted in their efforts to sell the property or lease it.

On April 11, 1962, the state court entered judgment denying Union relief. The court held that Union was not entitled to possession because the various agreements executed by appellants, Union, and Hart on December 21, 1955, were not intended to and did not create a landlord-tenant relationship. The court further held that appellants had not agreed to guarantee the down payment loan or to "mortgage" the premises to secure it, and that Union had no interest in the property in the nature of a "mortgage" or otherwise.

The state court found that the "lease-leaseback" agreements constituted a "requirements" contract intended "to bind the owner-operator to Union's product, as well as to impose a sanction in order to maintain an exclusive outlet for Union's gasoline," and that the "consent clause" to the "lease," signed by appellants, was

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[3]The facts thus far stated are taken from the state court's finding in this litigation.

The parties agree that these findings of fact, and others later recited in this opinion, were necessary to the state court judgment, and are binding upon them.

The state court also held that the "lease-leaseback" arrangement "would not probably foreclose competition in a substantial line of commerce affected throughout the area of effective competition." But the parties also agree that this finding was not necessary to the state court's judgment, and is therefore not binding.

"part and parcel of Union's objective of maintaining its exclusive outlet by a continued binding of the owner-operator of the subject premises to a requirements contract." The state court found that "Union desired to tie-up the subject premises to maintain an exclusive outlet for the sale of its gasoline," and that "Since the date of the alleged breaches by defendants and the inception of this litigation to the date of trial, Union has received of defendants precisely the object of the overriding intent of Union throughout this transaction, and that is that since the alleged breaches to the date of trial, Union's, and only Union's, gasoline has been sold from defendants' premises."

After the state court decision, Union took the position that although it was not entitled to possession of the station it "had a valid requirements contract with respect to this property," and therefore "for the term of this requirements contract (i.e., until December 31, 1970), Union Oil products must be used in the premises." Appellants allege that by advancing this claim, coupled with a warning that the premises were subject to a valid "mortgage,"[4] Union frustrated negotiations between appellants and various prospective purchasers or lessees subsequent to the state court decision. Appellants allege that such incidents occurred in or about June, September, and October of 1962, and February of 1963.

The complaint in the present action was filed January 18, 1963. It alleges that Union sells in excess of 40 per cent of the petroleum products sold in the Fairbanks metropolitan area and in the State of Alaska as a whole, and occupies a dominant position in the marketing of petroleum products in those areas. The complaint

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[4]As we have noted, text at note 3, the state court found that no interest in the property superior to appellants' interest was created by the "mortgage" executed by Hart December 21, 1955.

Moreover, appellants' second cause of action in the present suit alleged that the claims based upon the "lease-leaseback" arrangements and the "mortgages" were "wrongfully and maliciously asserted and are without any right whatever." On April 17, 1963, the district court granted partial summary judgment in appellants' favor as to this cause of action, holding that there was "no genuine issue of any material fact" with respect to liability, and that the only issue was that "of damages claimed as a result of wrongful and unlawful actions on the part of [Union] in asserting such claims."

details Union's conduct which resulted in the exclusion of all but Union products from appellants' service station. The complaint charges that Union pursued a similar course of action with respect to "numerous" other service station owners and operators, and thereby required them to maintain their service stations as exclusive outlets for Union's products. It alleges that Union acted for the purpose and with the effect of foreclosing competition in a substantial line of commerce, and that its conduct violated the antitrust laws. The complaint charges that by reason of Union's acts appellants were unable to operate a service station on the premises or to sell or lease the property for that purpose from the time the station was vacated by Transfare, Inc., on April 30, 1961, and that appellants thereby suffered damage, through loss of rental income from the property and diminution of its value, in the amount of $50,000.

I

Union relies upon a number of cases (particularly *Harrison v. Paramount Pictures Inc.*, 115 F.Supp. 312 (E.D. Pa. 1953), *aff'd* 211 F.2d 405 (3d Cir. 1954), and *Melrose Realty Co. v. Loew's Inc.*, 234 F.2d 518 (3d Cir. 1956)),[5] which Union reads as holding that a lessor may not recover damages under 15 U.S.C. § 15 for injuries resulting from a violation of the antitrust laws directed against the lessee, because as to the lessor such injuries are "remote," "indirect," or "incidental."[6] As this court and others

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[5]See also Westmoreland Asbestos Co. v. Johns Manville Corp., 30 F.Supp. 389 (S.D.N.Y. 1939), aff'd 113 F.2d 114 (2d Cir. 1940). But see Steiner v. Twentieth Century Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Congress Bldg. Corp. v. Loew's Inc., 246 F.2d 587 (7th Cir. 1957); and Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958). And compare also decisions allowing recovery for damages resulting from intentional and unprivileged interference with plaintiffs' existing or prospective contractual relations with others, particularly cases collected in Prosser on Torts 960 nn. 20-32 (1964). See also Harper & James, Torts 499, 502-03, 511-13; 2 Callmann, Unfair Competition 585 (1950); 4 Restatement, Torts § 766.

[6]Union also relies upon authority which it reads as denying appellants standing to sue for damages resulting solely from alleged price discriminations in favor of, or against, appellants' lessees. The record does not present that question. See note 2.

have noted,[7] language in a number of Supreme Court opinions[8] casts doubt upon these and other restrictive "judicial glosses"[9] upon the broad language of the Clayton Act § 4, 15 U.S.C. § 15. Be that as it may, the relationship disclosed in this record between Union's violation and appellants' injury satisfies all of the formulations of the statute's requirements suggested by any decision of which we are aware, including those relied upon by Union.

The gist of appellants' charge is that Union sought to restrain competition by restricting a substantial number of retail outlets, including appellants' service station, to the sale of Union gasoline. The alleged purpose and effect of Union's course of conduct was to foreclose competitive sales through appellants' service station. Appellants, as the owners of that property, were the key to its control, and they were the direct and primary objects of the means by which Union undertook to accomplish its purpose. Appellants' contract vendee, the successive lessees, and the various potential lessees and purchasers of the property from appellants were objects of Union's attention only as this became necessary to the imposition and enforcement of the desired anticompetitive condition upon the use of the property itself.

Union's allegedly illegal conduct was thus "aimed" at restricting the use of appellants' property. Appellants and their property were within the "target area" of that conduct—"the area which it could reasonably be foreseen would be affected" by the antitrust violation. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir. 1964). See also *Karseal v. Richfield Oil Corp.*, 221 F.2d 358, 362-64 (9th Cir. 1955); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951). Appellants' claim was not "derivative," for they sued for damages sustained by themselves and not by their tenants or

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[7]South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 418 (4th Cir. 1966); Harman v. Valley Nat'l Bank, 339 F.2d 564, 567 (9th Cir. 1964); Congress Bldg. Corp. v. Loew's Inc., 246 F.2d 587, 592 (7th Cir. 1957); 64 Colum. L. Rev. 570, 587 (1964); 41 Wash. L. Rev. 174, 179-80 (1966).

[8]Particularly Radovich v. Nat'l Football League, 352 U.S. 445, 453-54 (1957); and Radiant Burners v. Peoples Gas Co., 364 U.S. 656, 660 (1961). See also Guilfoil, 10 Antitrust Bull. 747, 776 (1965); Note, 69 Harv. L. Rev. 575, 576 (1956).

[9]64 Colum. L. Rev. 570, 585 (1964).

others. Their injuries were "direct" for they arose out of appellants' own relationships with Union—reflected in the "consent clause," the state court litigation, and Union's successful efforts to prevent appellants from leasing or selling the premises free of the restrictive condition. Appellants' injuries were not "consequential" or "secondary," for they did not result from injury to third persons. They were not "remote," for they were the immediate result of the illegal conduct, without intervening cause. *Congress Bldg. Corp. v. Loew's Inc.*, 246 F.2d 587, 592-94 (7th Cir. 1957); *Steiner v. Twentieth Century Fox Film Corp.*, 232 F.2d 190, 192-93 (9th Cir. 1956); *Productive Inventions v. Trico Prods. Co.*, 224 F.2d 678, 679 (2d Cir. 1955); *Conference of Studio Unions v. Loew's Inc., supra* at 54-55.

Imposition of liability for such damages clearly serves the statute's purposes. *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414, 418-19 (4th Cir. 1966); *Karseal v. Richfield Oil Corp., supra* at 365; *Conference of Studio Unions v. Loew's Inc., supra* at 54-55; 64 Colum. L. Rev. 570, 587 (1964); 57 Nw. L. Rev. 691, 707 (1963).

It is no bar that appellants were not competitors of Union, or that appellants' injuries did not result from the effect of the allegedly illegal restraint upon the marketing of petroleum products but rather from the means which Union used to accomplish that restraint. *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 Fed. 574 (2d Cir. 1916). "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Neither does it immunize the outlawed acts because they are done by any of these. The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948).

II

Union argues that the judgment should be sustained on an alternate ground, urged upon the district court but not reached, that appellants' antitrust claim is barred by the four-year statute of limitations. 15 U.S.C. § 15b. Union reasons that appellants' cause of action rests upon the "lease-leaseback" agreements exe-

cuted December 21, 1955; that the last act causing injury which could conceivably involve Union was its consent to the assumption of the obligation of these agreements by Mr. Schroeder and Mr. Wisel and later by Transfare, Inc.; and that the operative force of this consent expired no later than May 18, 1958, when Hart and Transfare quitclaimed their interests to appellants.

Union views appellants' claim too narrowly. The alleged antitrust violation consists of Union's entire course of conduct directed to the establishment and maintenance of exclusive dealing arrangements with service station outlets in Fairbanks and other Alaska areas. Acts of Union in furtherance of this purpose, which appellants contend caused them injury and damage, included Union's efforts to prevent appellants from selling or leasing their station free of the exclusive dealing condition. These acts continued until the complaint was filed and thereafter. Thus, appellants' action is not barred even if the invasion of their interests is considered to have been episodic rather than continuous. See generally *Steiner v. Twentieth Century Fox Film Corp.*, 232 F.2d 190, 194-95 (9th Cir. 1956); *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 731-32 (8th Cir. 1964).

III

Appellants contend that the district court erred in denying their motion for summary judgment on the issue of liability. We do not agree. Exclusive dealing arrangements are not *per se* illegal. *Tampa Elec. Co. v. Nashville Co.*, 365 U.S. 320, 333, 335 (1961). It cannot be determined on the present record that Union's use of such arrangements was accompanied by such a purpose, or had such a probable effect, as would require their condemnation under the antitrust laws. See generally *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 467-69, 474-75 (9th Cir. 1964).

Reversed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-7-67—210